



PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of : Len C. Kretchman et al
For : "Sealed-Crustless Sandwich"
Serial No. : 90/005,949
Filed : March 9, 2001
Patent No. : 6,004,596
Examiner : George C. Yeung
Group Art Unit : 1761
Our Docket No. : SMA-12271 RX

DECLARATION OF JOHN PURCELL

I, John Purcell, being warned that false statements and the like are punishable by fine or imprisonment or both under 18 U.S.C. § 1001 hereby declares that all statements made of his own knowledge are true and any statements made on information and belief are believed to be true.

1. Attached hereto as Exhibit A is my biography showing my qualifications to testify on items in this declaration.

2. I am familiar with the crustless sandwich sold by The J. M. Smucker Company under the trademark "Uncrustables." This product is now on the shelves of major retail stores, such as Kroger, Giant Eagle, etc. Dedication and retention of shelf space in such major grocery stores is evidence of the commercial success of a food product.

3. I have been told that the Uncrustables crustless sandwich have been accepted by many school districts throughout the United States as a snack and lunch item. I have knowledge of

how school districts select and purchase food items. From this experience, I have comprehensive knowledge of food items purchased in K-12 school systems throughout the United States. I have worked with procurement directors and offices in hundreds of K-12 systems over the past 25-years as an expert consultant in their large scale purchasing for school children. One criteria used by the districts is the demonstrated ability of the food items to be immediately acceptable to a major percent of the students. This required qualification is a strict, two tier test, including professional dietitians and the students. This test is more difficult for a food item to meet than mere retail acceptance of traditional retail food items. The "Uncrustables" has conformed to this high level of commercial success by being sold to hundreds of school districts. I have been informed that 3,000 districts have purchased over 37 million Uncrustables brand sandwiches since January 1, 2001. This is substantial acceptance.

4. The Uncrustables brand snack food is shown in cross-section in Exhibit B (this cross section is not part of this document). This size is about four inches in diameter for both retail and school districts. As can be seen, the two bread layers are sealed around the outer perimeter area, with a surface-to-surface bread seal that does not crush the bread into a compacted mass. The bread retains its fresh consistency. This can be tested by anyone purchasing a package of Uncrustables, which are available nationwide. Maintaining the bread in its conventional, fresh state is important to commercial acceptance. The jelly layer is captured between two layers of peanut butter that are also sealed together around a perimeter area. The peanut butter surface seal is between the jelly and the outer seal of the bread. This construction allows the crustless sandwich to duplicate a home made peanut butter and jelly sandwich while allowing a seal of the central filling without damage to the conventional bread consistency. This novel construction accounts for widespread acceptance

of this food item in demanding school programs, as well as in the highly competitive retail grocery trade. Anyone reading this declaration can independently verify my analysis by merely shopping at the large chain neighborhood grocery store and tasting an Uncrustables brand crustless sandwich.

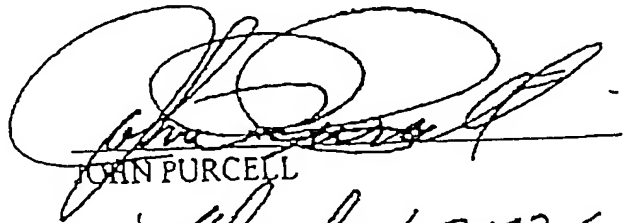
5. I have been told that attached claims 43 and 44 (Exhibit C) are, or will be, before the United States Patent and Trademark Office (PTO). I believe these claims define the "Uncrustables" now being sold.

6. The Uncrustables product is a crustless sandwich. It is not a pastry dessert, such as strudel, not a health food item, such as a fruit bar with a pastry shell, not a candy, such as Hershey bar, nor a meat sandwich, such as a hamburger. The market for the Uncrustables brand crustless sandwich is unique. It is a peanut butter and jelly sandwich. It competes for satisfaction of the consumers' hunger with only the combined sale of a jar of peanut butter, a jar of jelly and a loaf of bread. I know of no market share data in this competitive area. Of course, the Uncrustables brand sandwich would compete with a preformed commercial peanut butter and jelly sandwich; however, I know of no such retail product. In summary, the "Uncrustables" brand sandwich defines its own market and has a vast majority of the market share.

7. It is my understanding that the Uncrustables brand product was immediately accepted by professionals in school administrations and by marketing people operating retail outlets. This acceptance was without massive advertising. In the retail trade, a product will not be allocated shelf space unless it sells well, i.e. it is commercially successful. Commercial success of a snack food item is sales volume. It is my understanding that the yearly sales of the Uncrustables brand exceed 50,000,000 crustless sandwiches. These sandwiches are defined by claims 43 and 44. The reason

for these large sales is the construction of the crustless sandwich. No amount of advertising would force a child to eat this product if it were not tasty and like a homemade peanut butter and jelly sandwich. I do not believe a plain sandwich with a layer of peanut butter and jelly between two slices of bread could be successfully marketed even though it would be classified as a peanut butter and jelly sandwich. I know The J. M. Smucker Company (Smucker) to be a prudent, successful company marketing fruit products and snack items. It is my understanding that Smucker has brought on line a facility to make 100,000,000 crustless sandwiches per year. This commitment would not be feasible if the Uncrustables crustless sandwich was not commercially successful.

8. In summary, the Uncrustables brand crustless sandwich as defined in claims 43 and 44 has created a market and has become successful to both professionals and retail customers in a short time without massive advertising. I am not a lawyer, but in the food industry such success is commercial success.


JOHN PURCELL

Date:

March 1, 2002

City:

Parkville, Maryland
20853